STATE OF MICHIGAN

COURT OF APPEALS

JAYNE SZUKALOWSKI,

Plaintiff-Appellant,

v

BAY DE NOC COMMUNITY COLLEGE and ALAN YECK,

Defendants-Appellees.

UNPUBLISHED
January 18, 2011

No. 295749
Delta Circuit Court
LC No. 06-018774-NZ

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

In 2001, defendant Bay de Noc Community College hired plaintiff as its director of safety training, a new position with the college. After plaintiff received a new supervisor, defendant Alan Yeck, he proposed a change in structure to the position that would alter the rate and manner of payment. He also reprimanded plaintiff for her handling of various issues and her attendance. In June 2004, plaintiff wrote a letter to the president of the college, tendering her resignation. Plaintiff filed this action, alleging three counts: (1) gender discrimination in violation of the Elliott-Larsen Civil Rights Act[1] (CRA), (2) wrongful termination (based on a theory of constructive discharge), and (3) unlawful retaliation under the CRA. Defendants moved for summary disposition, and the trial court granted the motion with respect to the two CRA claims and denied it with respect to the wrongful termination claim. The parties then entered into a stipulated order dismissing the wrongful termination claim, and plaintiff filed this appeal. We review a trial court's grant of summary disposition de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009).

Section 202 of the CRA prohibits discrimination by employers on the basis of sex. MCL 37.2202. Sex discrimination, like any other civil action, may be proved by direct or

[1] MCL 37.2101 *et seq.*

circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 132; 666 NW2d 186 (2003). Here, plaintiff produced only circumstantial evidence. In cases involving circumstantial evidence, Michigan follows the approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, 469 Mich at 133-134; *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). The *McDonnell Douglas* approach first requires the plaintiff to show that she was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Smith v Goodwill Industries of West Mich, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000) (further citation omitted). If the plaintiff can present this evidence, she has made a prima facie case and "a presumption of discrimination arises." *Hazle*, 464 Mich at 463. This prima facie case, however, does not necessarily preclude summary disposition in favor of the defendant. *Id.* at 463-464. The burden instead shifts to the defendant to "articulate a legitimate nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id.* at 464. In order to do so, the defendant must do more than answer the complaint; he must present evidence that his actions had a legitimate nondiscriminatory purpose. *Id.* at 464-465. If the defendant does so, the presumption of discrimination "drops away." *Id.* at 465. In order to survive summary disposition, then, the plaintiff must demonstrate that the evidence presented is sufficient to allow a reasonable trier of fact to conclude that discrimination was a motivating factor for the defendant's adverse action. *Id.*

Here, plaintiff failed to make a prima facie case of sex discrimination because she did not show that the fourth element that "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct," *Smith*, 243 Mich App at 448, was satisfied. She argues that she was similarly situated to her male coworker Doug Russell, that he was outside the protected class, and that he was unaffected by defendants' adverse conduct. The trial court found that plaintiff and Russell were not similarly situated. The evidence presented established that Russell had five more years' employment with the college than plaintiff did, that he held a master's degree while plaintiff only held a bachelor's degree, that he wrote significantly more grants than plaintiff did, and that he was responsible for a greater variety of training programs than plaintiff.

The facts here resemble those in *Smith*. In that case, the plaintiff argued that she was similarly situated to Tejchma, her male coworker, because "they held lateral management positions . . . on [the defendant employer's] organizational chart." *Smith*, 243 Mich App at 449. This Court held that the proofs presented were insufficient because a plaintiff was required to demonstrate that all relevant aspects of the employment situation were '"nearly identical"' to those of the plaintiff's situation. *Id.* (citations omitted). The Court went on to hold that Smith and Tejchma were not similarly situated, in part because Tejchma held a bachelor's degree while Smith did not, because Tejchma had more experience than Smith, and because Tejchma had more extensive experience and duties than Smith did. *Id.* at 449-450. This Court therefore affirmed the dismissal of Smith's sex discrimination claim. *Id.* at 450.

In the present case, the trial court properly granted summary disposition in favor of defendants in light of the differences between plaintiff and Russell. Plaintiff and Russell held lateral positions, and both were supervised by Yeck. Their duties were similar, but the

differences between the two—in education, in experience, and in duties—demonstrate that plaintiff and Russell were not similarly situated for the purposes of making a prima facie claim of sex discrimination. We therefore affirm the trial court's dismissal of the discrimination claim.

Section 701 of the CRA provides that "a person shall not . . . [r]etaliate or discriminate against a person because the person has opposed a violation of" the CRA. MCL 37.2701(a). In order to state a case of retaliation, a plaintiff must show the following: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Comm Mental Heatlh Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005) (further citation omitted).

Although plaintiff alleged in her complaint that she protested the actions of Yeck as being illegal because they were discriminatory, she provides no evidence to support this allegation. In her deposition, plaintiff testified that she told another M-TEC employee that Yeck's attempt to demote her "isn't right." She also testified that she told Yeck that his reprimand of her was "illegal." However, plaintiff fails to identify any evidence to support the allegation that Yeck was aware that plaintiff was protesting his actions *as being acts of sex discrimination*. In the absence of any evidence supporting a finding that Yeck knew plaintiff was opposing sex discrimination in violation of the CRA, we affirm the trial court's dismissal of the retaliation claim.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto